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No. 92-1466

IN THE

Supreme Court of the United States

October Term, 1992

BRAXSTON LEE BANKS,

Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

The questions presented by the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, dated March 10, 1993 ("Petition"), do not accurately reflect the decision of the appellate court reprinted at Petitioner's Appendix. The judgment of the court of appeals did not rest on a conclusion that Respondent's eligibility rules for student-athletes were procompetitive, nor did the appellate court base its ruling that Petitioner's claim for an injunction was moot on facts not before that court. Rather, the judgment of the appellate court was based on its determination that Petitioner's Amended Complaint failed to allege an essential element of his cause of action and, as to its ruling on mootness, on facts contained in Petitioner's own pleadings. Accordingly, the questions presented for review are:

1. Is dismissal of a rule of reason complaint under Section 1 of the Sherman Act, 15 U.S.C. § 1, for failure to state a claim on which relief can be granted proper when the complaint fails to allege, either directly or inferentially, an injury to competition in any relevant market?

2. Does a plaintiff whose own claim is moot have constitutional standing to seek injunctive relief on behalf of a class that has never been certified when the plaintiff had almost four months to file his lawsuit and seek class certification before his claim became moot?

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BRIEF FOR RESPONDENT IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Contrary to Petitioner's assertions, the United States Court of Appeals for the Seventh Circuit did not hold that the eligibility rules of Respondent National Collegiate Athletic Association ("NCAA") are immune to antitrust scrutiny or exempt from the Sherman Act. Nor did the appellate court hold that the procompetitive effects of these eligibility rules outweigh

any anticompetitive effects. The Seventh Circuit merely held that, in this case, Petitioner's antitrust challenge to two of those rules was correctly dismissed because Petitioner failed to allege or explain how those rules injured competition in any relevant market. This decision is consistent with this Court's pronouncements that the focus of a rule of reason inquiry under Section 1 of the Sherman Act, 15 U.S.C. § 1, is injury to competition in the market and with numerous lower court decisions dismissing rule of reason complaints that fail to allege this essential element. There is thus no basis for granting a writ of certiorari.

1. Factual Background

The NCAA is a private, voluntary, unincorporated association of over one thousand members, primarily colleges and universities. Petitioner's Appendix ("Pet. App.") at 42a. According to its constitution, the NCAA's purpose is to promote intercollegiate athletics and to maintain amateur intercollegiate athletics "as an integral part of the educational program and the athlete as an integral part of the student body and by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports." *Id.* Approximately 187 colleges that play intercollegiate football are members of the NCAA, among them the University of Notre Dame ("Notre Dame"). *Id.*

The NCAA Bylaws, enacted by its members, regulate eligibility for participation in intercollegiate athletics at member colleges and universities. *Id.* In this case, Petitioner Braxston Banks challenged two of these Bylaws, Bylaw 12.2.4.2, the "no draft" rule, which makes an athlete ineligible for further intercollegiate play in any sport in which he has entered a professional draft, and Bylaw 12.3, the "no agent" rule, which makes an athlete ineligible for further intercollegiate play in any sport for which the athlete has retained an agent to market his services. *See id.* at 42a n.1, 43a n.2. Contrary to Banks's statement in his Petition ("Pet.") at 2, the no agent rule does not preclude an athlete from soliciting advice about his professional

marketability or about a proposed professional contract. This rule applies only when an agent *represents* an athlete for the purpose of marketing his services. *See* Pet. App. at 43a n.2.

Banks entered Notre Dame on a full grant-in-aid, worth approximately $16,000.00 per year, in September 1986. *Id.* at 44a. After playing football for three seasons, he elected to sit out his senior year, the 1989 season, because of a knee injury, although the Notre Dame trainer had released him to play. *Id.* at 45a. Despite having sat out the season, Banks decided not just to make inquiries (as permitted by the no agent rule), but to enter the National Football League ("NFL") draft the following spring, knowing that this decision would render him ineligible to play football again at Notre Dame. *Id.* at 46a-47a. After entering the draft, Banks retained a family friend and sports attorney who actively marketed Banks's services to NFL teams. *Id.* at 47a-48a. Banks demonstrated his prowess to virtually any NFL team that was interested and also attended the NFL annual tryout combine in Indianapolis, at which players display their skills to all NFL teams. *Id.* at 48a. When the draft was held on April 22 and 23, 1990, Banks was not selected by any NFL team, making him a "rookie free agent" in the NFL, free to contract with any of its 28 teams. *Id.* However, no team offered Banks a contract. *Id.* at 48a-49a.

Banks returned to Notre Dame during the summer of 1990 and graduated with a bachelor's degree in August 1990. *Id.* at 49a. He also tried to arrange to play out his fifth year of college football eligibility during the 1990 season. Banks's statement that a group boycott "enforced" by the NCAA prevented him from doing so is incorrect. Pet. at 8. The NCAA did nothing as to Banks other than inform him that it could not consider his request to restore his eligibility because such a request must come from a member institution. Pet. App. at 50a. Notre Dame declined to petition the NCAA to restore Banks's eligibility. *Id.*

2. Proceedings in the Lower Courts

Banks filed this lawsuit on August 9, 1990, claiming that these two NCAA eligibility rules effected a group boycott in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and seeking a preliminary injunction. After a hearing, the district court denied Banks's request for injunctive relief, finding that Banks had shown "no likelihood of success on the merits of his federal antitrust claim . . . ." Pet. App. at 68a.

Banks did not appeal this ruling, but filed an Amended Complaint seeking an injunction on behalf of a class of college football players (but not himself), and treble damages for himself. By this time, Banks had decided, for personal reasons, that he no longer wanted to play football for Notre Dame. Pet. at 7. Banks's statements in his Petition at 8 are a creative redrafting of the portion of his Amended Complaint that Banks contends adequately alleges an antitrust violation. In fact, the Amended Complaint states:

> (a) First, there is the restraint imposed by the NCAA on all of its member institutions that restricts them from offering a player such as Banks, who enters the draft and/or retains an agent, an opportunity to play college football again. The relevant market on which that restraint is imposed is all those players who wish to play football for major college teams, a market which is dominated by the NCAA.
>
> (b) Second, the Rules operate as a restraint on all members of the NCAA requiring them to abide by the Rules, and not to change them or grant waivers from them. This restraint operates directly on member institutions such as Notre Dame and indirectly, although intentionally, on players such as Banks. The relevant market is all major college football institutions since all NCA [sic] member institutions are subject to similar restrictions, and hence players like Banks are foreclosed from choosing a major college football team based on the willingness of the institution to waive or change its rules, or consider doing so.

> (c) The Rules also operate to restrain the ability of a player such as Banks from marketing his services to the NFL, by effectively giving him one and only one realistic chance to be drafted by the NFL. The relevant market being restrained is composed of players like Banks who are considering entering the NFL draft while they still have college football eligibility remaining.

Pet. App. at 85a-86a.

The NCAA moved to dismiss Banks's Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The NCAA argued first that Banks lacked *constitutional* standing to seek an injunction because, in light of his decision not to return to college football, he would never again be affected by the NCAA rules he challenged. *Id.* at 72a. The NCAA's second argument, that Banks lacked *antitrust* standing to seek an injunction, was also directed solely to *Banks's* claim for an injunction, although Banks has persistently mischaracterized this argument as a challenge to athletes' antitrust standing in general. *See* Pet. at 20.[1] In fact, the NCAA argued that Banks lacked standing to seek an injunction pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, because he was no longer *threatened* with antitrust injury, invoking the principle established by this Court in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113 (1986). Indeed, Banks was no longer threatened with *any* injury by the rules he challenged. Third, the NCAA argued that Banks's entire Amended Complaint should be dismissed because he failed to allege, either directly or inferentially, an injury to the process of competition in any relevant market. Pet. App. at 73a.

[1]Because the NCAA never argued that student-athletes in general lack antitrust standing, Banks's entire argument at pp. 20-21 of his Petition, including his citation to Areeda and Turner on standing, is irrelevant. The NCAA instead argued that, in general, Banks's cause of action had a far more fundamental flaw — he failed to allege an antitrust violation in the first instance.

The district court, misreading Seventh Circuit precedent on constitutional standing, ruled that since Banks had been threatened with injury when his initial Complaint was filed, "this is sufficient, at least for the time being, to avoid dismissal of the cause for want of constitutional standing." *Id.* at 75a. However, the district court agreed with the NCAA that Banks had failed to allege that the no draft and no agent rules had any "competitive impact on any identifiable market" and dismissed his Amended Complaint. *Id.* at 77a.[2]

Banks appealed to the Seventh Circuit, contending that the district court had improperly weighed the procompetitive effects of the no draft and no agent rules in deciding the motion to dismiss and that since other athletes excluded from teams by league rules stated a claim under the antitrust laws, he did too. The Seventh Circuit found that, contrary to Banks's contention, "The district court decided the case *not* on the basis of the relative anti-competitive effect of the rules versus the pro-competitive impact, but on the ground of Banks' absolute failure to allege an anti-competitive effect . . . ." *Id.* at 10a.[3] Applying established precedent, the Seventh Circuit held that Banks's Amended Complaint had been correctly dismissed

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[2]Banks states several times in his Petition that the district court found an "anticompetitive effect." *See* Pet. at 6-7, 14 n.6, 23. However, this "finding" was in the district court's ruling on preliminary injunction. *See* Pet. App. at 63a. When the district court later granted the NCAA's motion to dismiss, the district court referred to its earlier ruling:

> Specifically, the court held that the purported anticompetitive effects of the challenged NCAA rules were unlikely to impact upon those relevant markets affected by such regulations (e.g., NCAA member teams and NFL teams).

Id. at 70a. The district court went on to decide that Banks had failed to allege "an anti-competitive market impact sufficient to support his claim." *Id.* at 76a.

Moreover, the purported "anticompetitive effect" touted by Banks — that the no draft rule deters college players from entering the draft — does not support his claim, for it is obvious that Banks was not deterred. He entered the NFL draft, he retained an agent to market his services, he talked to NFL scouts, and he demonstrated his skills for any NFL team that was interested. *Id.* at 2a-4a.

[3]All emphasis in this Brief is supplied unless otherwise indicated.

because he failed to explain how the two rules he challenged injured competition in any relevant market. *Id.* at 27a. Judge Flaum in dissent agreed that Banks was required to allege an injury to competition, but found the missing element by equating the no draft rule with "price" in a college football labor market. *Id.* at 28a, 31a-32a.

On the constitutional standing issue, the Seventh Circuit held that the district court should have dismissed Banks's claim for an injunction as moot, reasoning that since Banks had had nearly 120 days between the NFL draft and the start of Notre Dame fall practice in which to file his complaint and seek class certification, his claim was not so fleeting or transitory as to qualify for a narrow exception to mootness in the class action context. *Id.* at 9a. In light of its ruling on the constitutional standing issue, the Seventh Circuit did not address the NCAA's argument that Banks also lacked antitrust standing to seek an injunction pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26. *Id.* at 7a n.6. The Seventh Circuit denied Banks's petition for rehearing with suggestion for rehearing en banc on December 10, 1992. *Id.* at 79a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE SEVENTH CIRCUIT DID NOT RULE THAT NCAA ELIGIBILITY RULES ARE "IMMUNE TO ANTITRUST CHALLENGE," BUT ONLY THAT THE PETITIONER IN THIS CASE FAILED TO ALLEGE AN ESSENTIAL ELEMENT OF HIS CAUSE OF ACTION.

Banks contends that his case is so special and so important as to warrant review on certiorari because the Seventh Circuit has precluded review of any NCAA rules under the antitrust laws. Banks states that the Seventh Circuit held:

- that "'eligibility rules' that restrict the terms on which schools compete in recruiting student-athletes are immune from challenge under the antitrust laws[,]" Pet. at 14;

- "that intercollegiate agreements in which NCAA schools collectively fix the terms on which they compete for student athletes are not subject to the antitrust laws at all[,]" *id.* at 15;

- "that members of the NCAA are permitted to enter into unreasonable restraints on competition with complete impunity — as long as they are directed at student-athlete eligibility[,]" *id.* at 17;

- "that student-athletes cannot challenge NCAA Rules . . . [,]" *id.* at 19; and

- that "NCAA agreements restricting competition for student-athletes [are] immune from challenges by the very individuals whose opportunities the agreements are designed to restrict[,]" *id.* at 21.

These statements are outright fabrications. In fact, according to the Seventh Circuit itself, what it *held* was "that Banks' failure to allege an anti-competitive impact on a discernible market justified the district court's dismissal for failure to [state a] claim upon which relief can be granted." Pet. App. at 27a. The dissent characterized the majority's holding this way: "Banks has not alleged that the rules are anticompetitive in the first instance[.]" *Id.* at 37a. While Banks's desire to frame an issue that will pique this Court's interest is understandable, his distortion of the Seventh Circuit opinion is not. Indeed, the scrutiny to which both the majority and the dissent subjected Banks's Amended Complaint belies his assertion that the appellate court held, or even thought it was holding, that eligibility rules like these are totally exempt from the antitrust laws.

Instead, all the Seventh Circuit did was to rule that Banks, like any other plaintiff with a rule of reason claim under Section 1 of the Sherman Act, is required to explain *how* the agreement he challenges injures the process of competition in some relevant market. Because Banks could not, his case was properly dismissed. As the Seventh Circuit explained:

> We agree with the district court's finding that the plaintiff has failed to allege an anti-competitive effect on a relevant market; at best Banks has merely attempted to frame his complaint in antitrust language. While Banks alleges a restraint on the market of college football players, college institutions who are members of the NCAA, and perhaps an NFL player recruitment market, *the complaint fails to explain how these alleged restraints diminish competition in or among the markets.*[4] In our review of Banks' arguments in his appellate briefs as well as our review of the oral argument, we have been unable to discern a cogent argument articulated even on appeal that the alleged restraints impose an anti-competitive effect on the alleged markets. The appellant merely claims that there is an anti-competitive effect, but he fails to explain what it is.

Id. at 26a (footnote omitted); *see also id.* at 14a-15a (Banks fails to allege an anticompetitive effect or explain how the no draft rule restrains trade); *id.* at 25a (Banks fails to illustrate how the NCAA rules diminish competition).

Banks also incorrectly states that the Seventh Circuit has now gone farther than other courts, specifically the Fifth Circuit, in immunizing NCAA rules from antitrust review. Pet. at 17. In fact, six other federal courts have examined whether NCAA eligibility rules violate the Sherman Act and, in every case, have concluded they do not. *See McCormack v. NCAA*, 845 F.2d 1338, 1344-45 (5th Cir. 1988); *Gaines v. NCAA*, 746 F.Supp. 738 (M.D. Tenn. 1990); *United States v. Walters*, 711 F.Supp. 1435, 1441-42 (N.D. Ill. 1989);[5] *Justice v. NCAA*, 577

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[4]Banks misleadingly quotes only the first part of this sentence, Pet. at 14, omitting the conclusion that he failed to explain how competition was diminished by the rules he challenged.

[5]The NCAA was not a party to this case. In *Walters*, the United States government argued "that the NCAA eligibility requirements and principles of amateurism adopted by the universities do not constitute unreasonable restraint [sic] of trade in violation of the Sherman Act." 711 F.Supp. at 1441. The district court agreed. *Id.* at 1442.

F.Supp. 356, 382-83 (D. Ariz. 1983); *Jones v. NCAA*, 392 F.Supp. 295, 303-04 (D. Mass. 1975); *College Athletic Placement Serv., Inc. v. NCAA*, 1975 Trade Cas. (CCH) ¶ 60,117 (D.N.J.), *aff'd*, 506 F.2d 1050 (3d Cir. 1974); *cf. Hennessey v. NCAA*, 564 F.2d 1136, 1153-54 (5th Cir. 1977) (NCAA rule limiting number of assistant coaches upheld under rule of reason). *Unlike* the Seventh Circuit in this case, three of these courts *expressly* held that NCAA eligibility rules are exempt from the antitrust laws. *See Gaines*, 746 F.Supp. at 744-45; *Jones*, 392 F.Supp. at 303; *College Athletic*, 1975 Trade Cas. at 65,267. However, even these three courts proceeded to examine whether the rules are anticompetitive. *See Gaines*, 746 F.Supp. at 745-47; *Jones*, 392 F.Supp. at 303-04; *College Athletic*, 1975 Trade Cas. at 65,267.

Banks claims that some of these courts "misread" this Court's pronouncement in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), that NCAA eligibility rules, by defining the unique product of college football, "widen consumer choice . . . and hence can be viewed as procompetitive." *Id.* at 101-02. These courts did not "misread" *Board of Regents* — these courts precisely applied the principles discussed in *Board of Regents* to decide *not* that NCAA rules are "immune" from the antitrust laws, but that, under the rule of reason, eligibility rules do not violate the Sherman Act because they do not harm competition. *See McCormack*, 845 F.2d at 1344-45; *Gaines*, 746 F.Supp. at 747; *Walters*, 711 F.Supp. at 1441-42.

II. THE SEVENTH CIRCUIT'S ANALYSIS OF THE ESSENTIAL ELEMENTS OF A RULE OF REASON CLAIM IS CONSISTENT WITH THE OPINIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS AND DOES NOT CONSTITUTE A QUESTION MERITING REVIEW ON CERTIORARI.

In declaring that Banks had to explain how the no draft and no agent rules injured competition in some relevant market in order to withstand a motion to dismiss, the Seventh Circuit

was applying well-established precedent involving rule of reason cases under Section 1 of the Sherman Act. In *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985), for example, the Seventh Circuit explained:

> The fundamental requirement . . . is that of a sufficient allegation of anticompetitive effects that would result or have resulted from the defendants' actions; the absence of such allegations is ordinarily fatal to the existence of a cause of action. The purpose of the Sherman Act is to rectify the injury to consumers caused by diminished competition . . . . Thus, the plaintiff must allege, not only an injury to himself, but an injury to the market as well.

Id. at 1107 (footnote and citations omitted); *see also Hennessy Indus. v. FMC Corp.*, 779 F.2d 402, 404 (7th Cir. 1985) (rule of reason complaint properly dismissed because plaintiff did not allege an injury to competition); *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1285 (7th Cir. 1983) (rule of reason complaint deficient because "[p]laintiff has not alleged any anticompetitive effect . . ."); *Havoco of America v. Shell Oil Co.*, 626 F.2d 549, 556-59 (7th Cir. 1980) (rule of reason complaint properly dismissed where there was no allegation of a harmful effect on a generalized market).

This principle — that an injury to competition in the market as a whole is an essential element of a rule of reason claim — is not peculiar to the Seventh Circuit. Numerous courts in other circuits have similarly dismissed antitrust complaints pursuant to Rule 12(b)(6) where there was no allegation, express or implied, of injury to the market. *See, e.g., Les Shockley Racing, Inc. v. National Hot Rod Ass'n*, 884 F.2d 504, 507-09 (9th Cir. 1989) (affirming Rule 12(b)(6) dismissal because plaintiffs did not allege injury to competition); *Garshman v. Universal Resources Holding Inc.*, 824 F.2d 223, 230-31 (3d Cir. 1987) ("What is . . . missing . . . is any allegation of an adverse effect upon competition"); *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484, 488 (8th Cir. 1985) (complaint should have been dismissed because it failed to allege any anticompetitive

effects within the relevant market); *Five Smiths, Inc. v. National Football League Players Ass'n*, 788 F.Supp. 1042, 1051-54 (D. Minn. 1992) (complaint deficient because plaintiffs allege only injury to themselves, but fail to allege an injury to competition in the market); *Retail Service Assocs. v. ConAgra Pet Products Co.*, 759 F.Supp. 976, 979-80 (D. Conn. 1991) ("'There must be some allegation of public injury to competition . . .'"); *American Standard Life & Accident Ins. Co. v. U.R.L., Inc.*, 701 F.Supp. 527, 537-38 (M.D.Pa. 1988) (complaint fails to allege an injury to competition).

In contending that his Amended Complaint adequately alleged a restraint of trade and injury to himself, Banks misses the fundamental point that under the antitrust laws, an injury to a competitor is *not* equivalent to an injury to competition. As this Court has declared, "The antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*[.]'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (emphasis original; quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). No one disputes that Braxston Banks was injured when he could not play a fifth year at Notre Dame. However, unless Banks can explain how the *process* of competition in the market was also injured, he does not state an antitrust claim.

All Banks does is to assert conclusorily that the NCAA eligibility rules restrain trade. *See, e.g.*, Pet. App. at 85a-86a; Pet. at 8. But, as this Court explained in *Board of Regents*, *all* agreements restrain trade:

> There can be no doubt that the challenged practices of the NCAA constitute a "restraint of trade" in the sense that they limit members' freedom to negotiate and enter into their own television contracts. In that sense, however, every contract is a restraint of trade, and as we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade.

468 U.S. at 98 (footnote omitted). Under the Sherman Act, an unreasonable restraint of trade is one that injures competition. *See id.* at 103-04.

This Court also explained in *Board of Regents* what is meant by an injury to competition. The NCAA television plan at issue in that case injured competition because it resulted in lower output and higher prices. *Id.* at 99-100, 104-08. Similarly, in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), this Court stated that the market injury that is an essential element of a rule of reason claim involves some showing that price, quality, supply, or demand has been affected by the challenged restraint. *See id.* at 29-32. Indeed, this Court said the same thing almost fifty years earlier, declaring that the restraints of trade that are condemned by the Sherman Act are those that "restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services . . . ." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940); *see also id.* at 497-98, 500-01, 512.

From the inception of this case in the district court, the NCAA has repeatedly asked Banks to explain *how* the no draft and no agent rules injure competition, i.e., distort price or output, or affect quality, supply, or demand in *any* relevant market. Despite numerous opportunities in the district court, in the Seventh Circuit, and now in his Brief to this Court, Banks has utterly failed to do so. Although Banks defined two markets — one in which colleges compete for football players and a second market in which NFL teams recruit college players, Banks has offered *no explanation* of how these two rules affect price, quality, supply, or demand in either of these markets. Indeed, the eligibility rules do not affect *any* of these economic factors. As the district court observed, "[T]he rules affect neither the players' ability to receive financing for their education nor the schools' opportunity to compete for athletes." Pet. App. at 77a.

Banks tries to circumvent this fatal flaw in his case by suggesting that since excluded athletes in cases like *Boris v. United States Football League*, 1984-1 Trade Cas. (CCH) ¶ 66,012 (C.D. Cal. 1984), *Linseman v. World Hockey Ass'n*, 439 F.Supp. 1315 (D. Conn. 1977), and *Denver Rockets v. All-Pro*

Management, Inc., 325 F.Supp. 1049 (C.D. Cal.), *injunction reinstated*, 401 U.S. 1204 (1971), stated a claim under the antitrust laws, he should be permitted to proceed with his case as well. *See* Pet. at 21 n.9. These cases, however, were decided under the per se rule. *See Boris*, 1984-1 Trade Cas. (CCH) at 68,463; *Linseman*, 439 F.Supp. at 1323; *Denver Rockets*, 325 F.Supp. at 1063-66. Unlike the rule of reason, the per se rule presumes market injury, and the plaintiff is not required to plead or prove an injury to competition in the market. Banks admits that his claims fall under the rule of reason. *See* Pet. App. at 57a. He thus cannot avoid his obligation to allege some market injury simply by citing *Boris*, *Linseman*, and *Denver Rockets*.

Although Banks himself could not articulate any anticompetitive effect of NCAA eligibility rules, the dissent in the Seventh Circuit inferred the missing element, market injury, from Banks's Amended Complaint by equating the NCAA's no draft rule to a "term of employment" in a college football labor market. *See* Pet. App. at 30a-32a. The dissent concluded that by agreeing on the no draft rule, colleges were, in effect, fixing the "price" they offered to student athletes. *Id.* at 32a. However, in antitrust terms, "price" cannot be so broadly construed. Just recently, Ivy League colleges and MIT were found to have fixed the price they charged for education by agreeing on how to calculate scholarship offers. *See United States v. Brown University*, 805 F.Supp. 288 (E.D. Pa. 1992), *appeal filed*, (3d Cir.). Although defendant MIT argued that colleges also compete in terms of the quality of "the curriculum, campus life, vocational opportunities and reputation" — the same factors listed by the dissent in the present case — there was no suggestion in *Brown* that price competition under the antitrust laws therefore includes such intangibles. *Id.* at 304.

Moreover, as the majority noted, by the dissent's logic, *every* NCAA eligibility requirement is arguably anticompetitive. Pet. App. at 17a. No doubt some players would like it if colleges "competed" by waiving minimum semester-hour require-

ments, by letting young men play football even if they had not graduated from high school, or by compensating players with cash instead of with an education. If the dissent is correct, these factors are all "terms of employment," and Banks should have amended his complaint to allege these "violations" as well. Contrary to the dissent's conclusion, in antitrust terms, price means price — and it clearly does not mean eligibility requirements in an educational setting.

As Banks does, the dissent also cited *Radovich v. National Football League*, 352 U.S. 445 (1957), and *Nichols v. Spencer International Press, Inc.*, 371 F.2d 332 (7th Cir. 1967), for the proposition that a complaint by a "supplier of labor" challenging an agreement among employers states a claim under the Sherman Act. *See* Pet. App. at 30a; Pet. at 20-21. In *Radovich*, the principal issue before this Court was whether the baseball exemption from the antitrust laws should be extended to professional football. 352 U.S. at 447. Deciding that it should not, this Court then considered whether the plaintiff, a football player who had been blacklisted, stated a claim under the Sherman Act. *Id.* at 452-53. This Court did not mention the rule of reason, much less the requirement of an injury to competition, because that was not an issue. A careful reading of the opinion reveals, however, that Radovich *did* allege an injury to the market — but *not* the labor market. The injury to competition in *Radovich* was that the challenged boycott crippled a rival, upstart league, strengthening the monopoly of the NFL. *Id.* at 449.

Likewise, in *Nichols*, the anticompetitive effect which led the Seventh Circuit to reverse the district court's summary judgment for the defendants was that the defendant publishers' agreement not to hire each other's employees for six months thwarted the market entry of new firms and arguably restrained trade in the products by *impairing the supply* of encyclopedias *to the public*. 371 F.2d at 336-37.

Contrary to the dissent's conclusion and to Banks's argument, there is *no analogous market injury* inflicted by the

NCAA's no draft and no agent rules in this case. No rival league is crippled; no new team is prevented from entering the market and "hiring" players; and the supply of college football *to the public* is not affected *at all*.

In fact, any discussion of how the public — consumers — are injured by NCAA eligibility rules is conspicuously absent from Banks's allegations and his arguments. According to this Court, "'Congress designed the Sherman Act as a "consumer welfare prescription[,]"'" and it is consumers' interests that courts protect in enforcing it. *Board of Regents*, 468 U.S. at 107 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)). As the district court observed, "[Banks] has demonstrated *no harm to consumer welfare* apart from the consumers' inability to see him play football this fall, a harm for which he must bear significant responsibility." Pet. App. at 67a.

In short, the Seventh Circuit did not affirm the dismissal of Banks's Amended Complaint because it found that NCAA eligibility rules are "exempt" from the antitrust laws. The Seventh Circuit did not rule that "members of the NCAA are permitted to enter into unreasonable restraints on competition with complete impunity . . . ." Pet. at 17. The Seventh Circuit simply declared, consistent with the pronouncements of this Court and numerous other lower courts, that where an antitrust plaintiff cannot explain how the restraint he challenges is "unreasonable" in the antitrust sense, that is, how it injures competition, his complaint should be dismissed. There is nothing so special, important, or remarkable about this ruling that certiorari should be granted.

III. NEITHER LOWER COURT IMPROPERLY WEIGHED THE PROCOMPETITIVE EFFECTS OF NCAA ELIGIBILITY RULES ON A MOTION TO DISMISS.

Banks's secondary argument in support of review is that the Seventh Circuit improperly weighed the procompetitive effects of the no draft and no agent rules in deciding a motion to

dismiss. Pet. at 23. Banks made the same argument to the Seventh Circuit, contending the district court had improperly considered the procompetitive effects of NCAA rules. Pet. App. at 10a. The Seventh Circuit rejected that argument because the basis of the district court's decision was *not* the procompetitive effects of NCAA rules, but Banks's failure to allege an anticompetitive effect *at all*. *Id.* at 10a-11a.

Banks states that in support of the NCAA's motion to dismiss, the NCAA claimed that "its Rules were reasonable . . . [,]" "the Rules were essential to preserve the procompetitive aspects of intercollegiate sports[,]" and "the Rules fostered competition. . . ." Pet. at 9, 23. These statements by Banks are bald misrepresentations of the record. In fact, on the motion to dismiss, the NCAA did *not* argue that its eligibility rules were procompetitive, but argued only that Banks's claim was deficient because he failed to allege how the no draft and no agent rules injured competition in any market. In fact, the *only* time in *any* of its briefs on the motion to dismiss in the district court and in the Seventh Circuit that the NCAA even asserted that these two eligibility rules had procompetitive effects was in the following sentence:

> The NCAA did not argue that Banks's Amended Complaint should be dismissed because NCAA eligibility rules are procompetitive (although they are), but because the Amended Complaint failed to allege the essential element of an injury to competition in any relevant market.

Brief of Appellee at 7-8.

Again, Banks is attempting to create an issue where there is none. The only antitrust issue on the merits before the district court and before the Seventh Circuit was whether Banks alleged an injury to competition in the first instance. The Seventh Circuit *did* discuss the procompetitive effects of NCAA rules in responding to points raised by the dissent. *See* Pet. App. at 14a-25a. However, as explained above, this was not its holding, nor was it even the basis of its holding.

Moreover, Banks's contention that because his Sherman Act claims fall under the rule of reason, his case should not have been dismissed without a *full* evidentiary hearing is tantamount to an assertion that rule of reason complaints are somehow exempt from Rule 12(b)(6). *See* Pet. at 24-25. As numerous courts have explained, they are not. *See, e.g.*, *Les Shockley*, 884 F.2d at 507-09; *Garshman*, 824 F.2d at 230-31; *Hennessy*, 779 F.2d at 404; *Razorback*, 761 F.2d at 488; *Car Carriers*, 745 F.2d at 1109-10; *Havoco*, 626 F.2d at 556-59; *Five Smiths*, 788 F.Supp. at 1051-54; *Retail Service*, 759 F.Supp. at 979-80; *American Standard*, 701 F.Supp. at 537-38. Like the complaints in those cases, because Banks's Amended Complaint failed to allege an essential element of his cause of action — an injury to competition in the market — his case was properly dismissed.

IV. THE SEVENTH CIRCUIT'S HOLDING THAT BANKS LACKED STANDING BECAUSE HIS CLAIM FOR INJUNCTIVE RELIEF ON BEHALF OF AN UNCERTIFIED CLASS WAS MOOT WAS COMPELLED BY THE UNAMBIGUOUS RULINGS OF THIS COURT.

With his Amended Complaint, Banks sought a permanent injunction on behalf of a class (but not himself) enjoining the NCAA from enforcing the challenged rules against the members of the class. Pet. App. at 88a-89a. The class that Banks sought to represent was never certified.

Banks's own Amended Complaint conceded that his claim for injunctive relief was moot as to him because he no longer sought an order that would permit him to play football for Notre Dame. *Id.* at 85a, 88a.

Applying this Court's decision in *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), the Seventh Circuit held that Banks lacked standing to seek an injunction on behalf of the uncertified class because his own personal claim was moot. Pet. App. at 7a-9a. The court of appeals noted that the requirement that the named plaintiff maintain a personal stake throughout the litigation "'can be avoided through certification of a class prior to expiration of the named plaintiff's personal

claim[,]'" *id.* at 8a (quoting *Geraghty*, 445 U.S. at 398), which had not occurred here.[6]

In analyzing the standing issue, the court of appeals also considered an exception to the mootness principle, explaining that "'[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.'" *Id.* at 9a (quoting *Geraghty*, 445 U.S. at 399). The court of appeals found, however, that Banks had nearly four months between the NFL draft and the start of Notre Dame football practice to bring his claim for injunctive relief and that his alleged injury was not "so inherently transitory" as to fit within this exception. *Id.*

Banks's Petition articulates no basis for challenging the court of appeals' conclusion. The only hint of what Banks perceives to be error is contained in the "Questions Presented" statement on a preliminary page of his Petition, which asserts that the court of appeals' holding was based on its "assessment of facts that were neither presented to, nor found by, the district court[.]" Pet. at i.

The NCAA cannot imagine to what "facts" Banks refers. The court of appeals relied on only four facts to determine the standing issue: (1) that a class had never been certified; (2) that Banks no longer sought to play football for Notre Dame; (3) that Banks entered but was not selected in the NFL draft held April 22-23, 1990; and (4) that Notre Dame's football practice began August 17, 1990. *See* Pet. App. at 7a-9a. The first fact is obvious from the district court's record of proceedings; the latter three facts are all contained in Banks's own pleadings.

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[6]Banks notes in his Petition that the issue of class certification had been deferred by agreement of the parties and the district court, Pet. at 9, apparently hoping this Court will infer that Banks was lulled to his prejudice into inaction with respect to seeking certification. What Banks neglects to mention is that his claim for injunctive relief was indisputably moot *before* the district court and counsel agreed to defer the certification issue. *See* Pet. App. at 85a, 88a; "Joint Motion for Scheduling Order and Postponement of Joint Status Report and Telephonic Status Conference," filed October 31, 1990; Order entered November 6, 1990. Banks's Amended Complaint, which concedes mootness, was filed August 30, 1990.

See Pet. App. at 84a-85a, 88a; "Complaint — Class Action — For Injunctive Relief," filed August 9, 1990, ¶ 21.

Banks concedes that the court of appeals' resolution of the standing issue is not itself worthy of review. Its ruling is also unassailable and should not be reviewed by this Court in any event.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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